YES, WE CAN: THE AUTHORITY TO DETAIN AS CUSTOMARY INTERNATIONAL LAW

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Many commentators assert customary international law as they would like it to be, rather than as it actually is.[1]

I. Introduction

Efforts to combat terrorism in the wake of September 11th reveal a "central legal challenge" to the "legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped *before* they act."[2] This necessary objective is a challenge precisely because modern terrorism operates in a manner that transcends the paradigm of uniformed opposing forces envisioned by the Geneva Conventions. Even though

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[1] John B. Bellinger, III, U.S. Dep't of State Legal Advisor, Lecture at the University of Oxford, Oxford Leverhulme Programme on the Changing Character of War (Dec. 10, 2007), *available at* http://www.state.gov/s/l/rls/96687.htm [hereinafter Bellinger Lecture].

[2] Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (emphasis added).

the contemporary operational environment poses practical considerations not directly addressed within treaties or documented international laws, armed forces must nevertheless detain individuals who pose a threat in the context of armed conflict. This article will explore the customary international law (CIL)[3] sources of the initial right to detain individuals who pose such a threat.

Most international law scholars agree that CIL establishes standards for treatment of individuals detained by an armed force.[4] However, the logical precursor to these treatment principles—a rule describing a state's initial authority to lawfully detain individuals—does not currently exist as CIL.[5] Even in the present-day Global War on Terror (GWOT), where persons are regularly detained, "an increasing number of legal experts now acknowledge . . . the legal framework for conflicts with transnational terrorists like al Qaida is not clear."[6] Because the "Geneva Conventions were designed for traditional armed conflicts between States and their uniformed military forces, and do not provide all the answers for detention of persons in conflicts between a State and a transnational terrorist group[,]"[7] it is necessary to determine whether CIL adequately fills this legal gap.

This article argues that, regardless of the type of conflict in which states are engaged,[8] the authority to detain individuals rises to the level of

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[3] "The Statute of the International Court of Justice [ICJ] describes customary international law as 'a general practice accepted as law.'" INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xxxi (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC STUDY VOL. I] (quoting ICJ Statute, art. 38(1)(b)).

[4] *See infra* Part VI.

[5] *See infra* Part II.C.

[6] Bellinger Lecture, *supra* note 1. Although the phrase "Overseas Contingency Operation" may replace GWOT as a favored term of the Obama Administration, this article will utilize the GWOT term for ease of discussion, given the latter term's pervasive use by practitioners and scholars heretofore describing detention operations in present-day conflicts.

[7] *Id.* This conclusion is particularly useful when states are fighting transnational terrorists who do not adhere to the laws of war.

[8] The two main conflict types are international armed conflict (Geneva Convention Common Article 2) and non-international, or internal armed conflict (Geneva Convention Common Article 3). For a full discussion, see *infra* Part III. It should be noted that the authority to detain contemplated here refers only to lawful detention. This is in contrast to the "treatment" rules of CIL, described in Part VI, *infra*, which apply regardless of the legality of the initial detention of the individual. It should further be noted that this article does not seek to address specific aspects of due process to be provided to individuals. Importantly, a discussion of the specific framework of any particular

CIL.[9] In reaching this conclusion, Parts II and III of this article trace the background and common threads connecting detention law through various types of conflict, as seen in Additional Protocol I[10] and II[11] of the Geneva Conventions (AP I & II) and other recognized instruments of CIL.[12] Next, Part IV bridges the traditional gap between international and non-international armed conflict by demonstrating states' use of the "fundamental and accepted tool of detention in war."[13] Part V lays out a comprehensive test to determine whether the authority to detain rises to the level of CIL. This test includes not only the typical "state practice" and "*opinio juris*" prongs of CIL,[14] but also lesser known—yet equally important—aspects of CIL, including "specially affected" states (describing states with more practice than others in a particular aspect of armed conflict)[15] and "permissive rules" (describing state actions that are allowed, but not required, in armed conflict).[16] Lesser-known concepts like these are particularly helpful in evaluating the status of initial detention because they offer additional uncommon insights that test the "authority to detain" premise and arrive at the simple, universal rule of CIL.

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detention regime existing today is also outside of the scope of this article. Rather, this article focuses on developing a simple rule to demonstrate how a critical aspect of detention law—namely, the authority to detain—may achieve status as CIL.

[9] This argument contemplates only non-arbitrary detention, since arbitrary detention is clearly not authorized. As Part VI, *infra*, describes, the prohibition against arbitrary detention itself is already recognized as CIL. "The grounds for initial or continued detention have been limited to valid needs . . . ." ICRC STUDY VOL. I, *supra* note 3, at 345. Further, this article does not distinguish lawful from unlawful combatants, although clearly "a State engaged in armed conflict has at a minimum every right to capture and detain combatants acting unlawfully that it otherwise would have if the combatants were acting lawfully." Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba (Apr. 15, 2002), 41 I.L.M. 1015, 1021 n.12 (2002) [hereinafter Precautionary Measures Response].

[10] Protocol Additional to the Geneva Conventions of Aug.12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[11] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[12] *See infra* Part III.

[13] *See infra* Part IV.A. Further, as described in Part IV.B, the desire of states to hold commanders accountable for their actions regardless of the type of conflict in which they are engaged underscores the acceptance of detention as a fundamental tool in non-international armed conflict as well as international armed conflict.

[14] *See infra* Part V.A.

[15] *See infra* Part V.C.

[16] *See infra* Part V.B.

To answer the question of whether the authority to detain individuals rises to the level of CIL, this article adopts the perspective of a comprehensive study by the International Committee of the Red Cross (ICRC). While this study (ICRC Study) ostensibly codifies the rules and practice of internationally-recognized CIL, it does not contemplate whether the detention authority envisioned by this article rises to the level of CIL.[17] However, the ICRC Study gives valuable methods for testing and ultimately concluding what may constitute CIL.[18] These methods are particularly useful when viewed jointly with the common threads and fundamental command authority aspects of detention law. Part VI analogizes the rule proposed in this article to uncontroverted CIL through three critical rules of detention to demonstrate that the authority to detain must logically exist in CIL.[19]

Finally, Part VII addresses various counterarguments to the notion that the authority to detain individuals during conflict rises to CIL. Ultimately, in analyzing state practice in this critical area of international law, this article concludes that existing CIL does provide a legal basis for detention of individuals not falling neatly under the Third Geneva Convention (GC III)[20] as Prisoners of War (POWs)[21] or the Fourth

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[17] ICRC STUDY VOL. I, *supra* note 3, *passim*.

[18] As an example, the Study describes a "number of issues related to the conduct of hostilities [which] are regulated by the Hague Regulations, which have long been considered customary in international armed conflict." Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of* Customary International Law, 13 HUM. RTS. BRIEF 8, 11 (2006).

[19] Three critical rules of detention exist as a paradigm of CIL—the requirement for humane treatment, the prohibition against arbitrary detention, and the principle of non-refoulement. *See infra* Part VI. All three of these rules are triggered once individuals are in detention. For this reason, as argued in Part VI, a rule of CIL describing the *initial* authority to detain must logically exist in order to trigger the three established rules. That is, the written protections associated with treatment of detainees exist because of the unwritten CIL authority to detain individuals.

[20] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

[21] *Id.* art. 4. Article 4 defines a

> Prisoner of War as a member[] of the armed force of a Party to the conflict, as well as members of militias or volunteer corps . . . [or] organized resistance movement[] . . . provided that [the force fulfils the conditions of being] commanded by a person responsible for his subordinates . . . [wears] a fixed distinctive sign recognizable at a distance . . . carries arms openly . . . [and] conduct[s] operations in accordance with the laws and customs of war . . . [who falls] into the power of the enemy.

Geneva Convention (GC IV)[22] as civilians.[23] In this way, the article is useful for its implications in the GWOT and beyond. Above all, it will assist in enabling states to approach lawfully "the central legal challenge of modern terrorism."[24]

II. Background

Treaty law contemplates the detention of individuals during armed conflict.[25] However, the *initial* authority to detain is not explicitly stated in any body of law. Nevertheless, this article argues that this initial authority does exist in CIL. To properly assess this article's claim, one must first examine current treaty law in the detention arena. Treaty law can assist in determining CIL because treaties "help shed light on how states view certain rules of international law."[26] To further establish a background for analysis, this Part outlines the ability of CIL to function as a gap-filler for existing detention law. In addition, this Part describes in detail the landmark 2005 ICRC Study, the conclusions of which must weigh heavily in any discussion relating to the subject of CIL.

A. Gaps in Detention Law

During armed conflict, a state[27] may invariably need to detain individuals who pose a threat to its forces. For this reason, each state must seek a legal framework under which it can detain such individuals. Traditional law of war, including "[t]reaty law, principally reflected in the Geneva Conventions of 1949 and their Additional Protocols of 1977,

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Id.

[22] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[23] *Id.* art. 4 (defining civilians as "persons [who] . . . find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals.").

[24] Chesney & Goldsmith, *supra* note 2, at 1081.

[25] *See, e.g.*, GC IV, *supra* note 22, arts. 4, 5, 42, 43, & 78.

[26] Henckaerts, *supra* note 18, at 10.

[27] For a thorough discussion of the term "state" in international law, see Captain Gal Asael, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?,* ARMY LAW., July 2008, at 1, 14–15 (defining a state as an entity with a permanent population, defined territory, government, and the "capacity to enter into relations with other states," as required by CIL).

is well developed and covers many aspects of warfare."[28] Specifically, these treaties address the detention, or internment,[29] of individuals during times of conflict. For example, GC III provides protections for those individuals detained by enemy forces as POWs.[30] Additionally, GC IV outlines rules for treatment of civilians who are interned, either for their own protection or as a security threat,[31] during times of conflict.[32]

However, the traditional law of war codified in the Geneva Conventions is inadequate in certain types of conflicts not falling neatly into the international/non-international armed conflict distinction described below.[33] For example, the U.S. Government's view of the members of transnational terror organizations in the GWOT is that they do not qualify for the protections of either GC III as POWs or GC IV as civilians.[34] In the U.S. Government's view, GC III only covers individuals who follow the law of war and other listed requirements for protection under Article 4 of GC III.[35] Consequently, because al Qaida,

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[28] Henckaerts, *supra* note 18, at 8. Henckaerts is "a Legal Advisor in the Legal Division of the International Committee of the Red Cross and co-editor of the [ICRC Study referenced throughout this article]." *Id.*

[29] A state may also need to intern civilians for their own protection. For the purposes of this article, the terms "detain" and "intern," and "detainee" and "internee," are used interchangeably.

[30] *See* GC III, *supra* note 20, *passim*. "Furthermore, Article 4(a)4 of the Third Convention . . . contemplates the detention of . . . civilians accompanying armed forces." Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. (forthcoming 2009).

[31] *Compare* GC IV, *supra* note 22, art. 4 (describing the protection of individuals "in the hands of a Party to the conflict or Occupying Power of which they are not nationals"), *with id.* art. 5 (outlining the internment of individuals "suspected of or engaged in activities hostile to the security of the State").

[32] *See id.* arts. 2 & 3. "[T]he Fourth Geneva Convention does, indeed, generally constitute the most analogous rules concerning detention of civilians. It thus provides the best approximation of IHL rules when interpretive gaps rise." Goodman, *supra* note 30. "Articles 5, 27, 41–43, and 78 of the Fourth Convention plainly permit the detention, or internment, of civilians who pose . . . a threat [to the security of a state]." *Id.*

[33] *See infra* Part III (distinguishing between international and non-international armed conflict).

[34] Presidential Memorandum on Humane Treatment of Taliban and al Qaida Detainees (Feb. 7, 2002, declassified June 17, 2004) (on file with author); *see also* Statement by White House Press Secretary, Ari Fleischer, on the Geneva Convention (May 7, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.

[35] These requirements include having a fixed insignia, carrying arms openly, and following the command of a responsible person. *See* GC III, *supra* note 20, art. 4. Although the Taliban could be recognized as a state party to the Geneva Conventions (as the government of Afghanistan, which was a party to the Conventions), al Qaida and other international terrorist organizations could never be recognized as state parties to the

the Taliban, and other terrorist groups do not ostensibly follow these requirements, they do not qualify for protection under GC III.[36] Further, because the same individuals are often more than mere civilian bystanders—taking a direct part in hostilities, in contravention of the requirements of GC IV—they do not qualify for protection under the Fourth Geneva Convention.[37] Thus, a gap in coverage exists, according to the U.S. Government's view.[38]

Gaps in legal coverage can also result from "treaties [that] apply only to the states that have ratified them."[39] "Although the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, such as the Additional Protocols."[40] Nevertheless, the portions of these treaties for which there is universal agreement (i.e., from which countries have not persistently

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conventions. Thus, the members of these organizations could not be entitled to POW status.

[36] *See id.*

[37] *See* GC IV, *supra* note 22, *passim*.

[38] Many in the international community would disagree with this view. The ICRC argues that an individual must fall within one of the categories described by the Geneva Conventions. In its comprehensive study, the ICRC states:

> It should be noted, however, that all persons deprived of their liberty for reasons related to a non-international armed conflict must be given the opportunity to challenge the legality of the detention unless the government of the State affected by the non-international armed conflict claimed for itself belligerent rights, in which case enemy 'combatants' should benefit from the same treatment as granted to prisoners of war in international armed conflicts and detained civilians should benefit from the same treatment as granted to civilian persons protected by the Fourth Geneva Convention in international armed conflicts.

ICRC STUDY VOL. I, *supra* note 3, at 352. Further, as stated by panelist Deborah Pearlstein at the 2008 Creighton Law Review International Human Rights Symposium, "there is certainly nothing preventing the United States from drawing on [other] models in order to enhance the perceived international legitimacy of its operations, or simply to further clarify the contours of international human rights law applicable to the security detention it pursues." *International Human Rights Symposium*, 41 CREIGHTON L. REV. 663, 673 (2008) [hereinafter *International Human Rights Symposium*]. This article seeks to propose a rule that could serve the purpose of clarifying the U.S. view; namely, that the authority to detain is actually recognized as CIL, regardless of the type of conflict. Although this does not reconcile the differences between the United States and ICRC views of the application of Geneva Conventions, it may serve as a basic clarification for the legality of the initial detention of individuals.

[39] Henckaerts, *supra* note 18, at 8.

[40] *Id.*

objected from the time of a rule's inception),[41] and on which states act out of a sense of legal obligation,[42] are considered binding as instruments of CIL. For example, the United States did not ratify Additional Protocol I, but "expressed support for many of the principles set forth in that Protocol and believed that many of them should become customary law."[43] It is therefore necessary "to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of their treaty obligations."[44]

In the detention arena it is particularly important to determine which rules constitute CIL, because treaty law does not provide full legal coverage. Yet, in the area of state practice, CIL is not always clear. "For example, although the terms 'combatants' and 'civilians' are clearly defined in international armed conflicts, [state] practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians in non-international armed conflicts."[45] The next section explores the concept of state practice, which is critical for a particular rule of armed conflict to rise to the level of CIL and fill the legal gap described herein.

B. Customary International Law as Gap-Filler

Customary International Law maintains functional significance in modern times, in part, because "treaty law does not cover the entire spectrum of [the Laws of War]. Non-international armed conflicts, for example, are subject to far fewer treaty provisions than international armed conflict. Hence . . . 'customary law is of immense significance.'"[46] The International Court of Justice defines CIL as "a

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[41] *Id.* at 9.
[42] This concept is sometimes referred to as *opinio juris*. *See infra* Part V.A.2.
[43] Sabrina Balgamwalla, Conference Review, *The Reaffirmation of Custom as an Important Source of International Humanitarian Law*, 13 HUM. RTS. BRIEF 13, 15 (2006).
[44] Henckaerts, *supra* note 18, at 8.
[45] *Id.* at 11. The rules for combatants and civilians in international armed conflict derive from the Hague Regulations and Additional Protocol I, and have never been contradicted by official state practice. *See* ICRC STUDY VOL. I, *supra* note 3, at 11–19.
[46] Dennis Mandsager, *Introductory Note to Response of Jean-Marie Henckaerts to the U.S. Joint Letter From John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study*, 46 I.L.M. 957, 957 (2007). The term "Law of War"

general practice accepted as law."[47] Legally, CIL is persuasive because "[r]ules of customary international humanitarian law . . . , sometimes referred to as 'general' international law, bind all States and, where relevant, all parties to the conflict, without the need for formal adherence."[48] Even though states may not repeatedly espouse the existence of the authority to detain in armed conflict, their consistent use of the practice, undertaken—or at least allowed—as a matter of law, suggests that it can still be considered CIL.[49] Therefore, by definition, CIL can be used to fill gaps in legal coverage such as those described in Part II.A above.

C. ICRC Study on CIL

In 2005, in response to a request from the international community ten years prior, the ICRC produced a comprehensive study "analyz[ing] issues in order to establish what rules of customary international law can

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is synonymous with the ICRC's use of the term "International Humanitarian Law." Dennis Mandsager, *Introductory Note of U.S. Joint Letter From John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study*, 46 I.L.M. 511, 511 (2007) [hereinafter Mandsager, *Introductory Note of U.S. Government's Response*].

[47] Henckaerts, *supra* note 18, at 8 (quoting Rome Statute of the International Court of Justice, ch. II, art. 38, sec. 1(b) (June 26, 1945), *available at* http://www.yale.edu/lawweb/Avalon/decade/decad026.htm).

[48] Jakob Kellenberger, *Foreword to* INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], 1 CUSTOMARY INT'L HUMANITARIAN L., at x (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

> It is generally agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitates*).

ICRC STUDY VOL. I, *supra* note 3, at xxxi–ii. For a good recapitulation of the first conference in North America after the release of the ICRC Study, see Balgamwalla, *supra* note 43, at 13 ("[C]ustomary rules are considered binding upon all nations, regardless of whether or not they are signatories to the Geneva Conventions or its Additional Protocols.").

[49] *See* Int'l Committee of the Red Cross, Response of Jean-Marie Henckaerts to the Bellinger/Haynes Comments on Customary International Law Study (July 2007), 46 I.L.M. 959, 960 (2007) [hereinafter Henckaerts's Response to U.S. Government's Response] (arguing that the legal prong of the CIL test can be satisfied when a state believes a certain practice is allowed, vice required); *see also infra* Part V.A.

be found inductively on the basis of [s]tate practice in relation to these issues."[50] The ICRC Study is organized into a numerical listing of "rules" viewed as constituting CIL, followed by multiple examples of "practice" by states under the rubric of each general rule.[51] Overall, the ICRC Study "identifies 161 rules found to have attained the status of customary humanitarian law and seeks to provide a snapshot of custom today that is as accurate as possible."[52] This voluminous work, in the ICRC's view, "present[s] an accurate assessment of the current state of customary international humanitarian law."[53] Furthermore, the ICRC Study covers all types of conflicts, as it is "a report on customary rules of international humanitarian law applicable in [both] international and non-international armed conflicts."[54]

The ICRC Study is the first widely-recognized attempt to codify CIL, which had previously been limited by its nature to an unwritten, subjectively interpreted regime.[55] More than merely an internal ICRC project, the Study incorporated the views of many of the leading international law experts.[56] In its own words, the ICRC "spent nearly ten years on research and consultation involving more than 150 governmental and academic experts."[57] The intensity of this effort

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[50] ICRC STUDY VOL. I, *supra* note 3, at xxx. The ICRC is widely recognized as the most prominent non-governmental organization involved in armed conflicts throughout the world. The ICRC's mandate, given to it by states, to "work for the faithful application of international humanitarian law applicable in armed conflicts . . . [,]"is derived from the Geneva Conventions (for international armed conflicts) and the Statutes of the International Red Cross and Red Crescent Movement (for internal armed conflicts). Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 961 (quoting Statutes of the Int'l Red Cross and Red Crescent Movement, adopted by the 25th Int'l Conference of the Red Cross, Geneva, Oct. 23–31, 1986, art. 5(2)(c), (g)); *see also* International Committee of the Red Cross (ICRC), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_mandate (last visited Jan. 19, 2009).

[51] *See* ICRC STUDY VOL. I, *supra* note 3, *passim*; INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 2009 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC STUDY VOL. II]. The Study contains several thousand pages, encompassing the rules and examples illustrating each rule.

[52] Henckaerts, *supra* note 18, at 8.

[53] Kellenberger, *supra* note 48, at xi.

[54] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 959.

[55] *See* ICRC STUDY VOL. I, *supra* note 3, at xxix ("A study on customary international humanitarian law may also be helpful in reducing the uncertainties and the scope for argument inherent in the concept of [CIL].").

[56] *See* Henckaerts, *supra* note 18, at 10.

[57] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 959.

throughout the international community underscores the wide recognition of most rules identified by the Study.[58]

In response to the ICRC Study, in November 2006, the U.S. State Department Legal Advisor, John Bellinger III, and the U.S. Department of Defense General Counsel, William J. Haynes, wrote a joint letter to Dr. Jakob Kellenberger, the President of the ICRC.[59] This letter identified some methodological flaws viewed by the U.S. Government as undermining the credibility of the ICRC Study.[60] Although the U.S. Government recognized that "a significant number of the rules set forth in the Study are applicable . . . because they have achieved universal status . . . ,"[61] Bellinger and Haynes argued that "the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law."[62] In particular, the letter focused on the United States' disagreement with four of the ICRC-identified rules, involving the areas of humanitarian relief personnel, damage to the environment, the use of rounds designed to explode within the human body, and jurisdiction over war crimes.[63]

Finally, in July 2007, ICRC Legal Advisor and principal ICRC Study author, Jean-Marie Henckaerts authored his own rejoinder to the U.S. Government's response.[64] In his letter, Henckaerts responded to each of the United States' main points, ultimately concluding that "the formation of customary law is an ongoing process."[65] In this way, Henckaerts and the ICRC welcome the U.S. Government's response as "part of [the] dialogue"[66] necessary to further the development of CIL. Henckaerts

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[58] *But see* Letter from John B. Bellinger III, Legal Advisor, U.S. Dep't of State, and William J. Haynes, General Counsel, U.S. Dep't of Def., to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), *in* 46 INT'L LEGAL MATERIALS 514 *passim* (2007) [hereinafter U.S. Government's Response] (describing the U.S. Government's disagreement with some of the rules identified in the ICRC Study). However, even the U.S. Government's Response did not dispute the formulation of the majority of rules identified in the ICRC Study. *See* Mandsager, *Introductory Note of U.S. Government's Response*, *supra* note 46, at 511.

[59] U.S. Government's Response, *supra* note 58, at 514.

[60] *Id. passim*.

[61] *Id.* at 514.

[62] *Id.*

[63] *Id. passim*.

[64] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 959.

[65] *Id.* at 966.

[66] *Id.*

further noted that the ICRC Study "has already found its way into the jurisprudence of several States, including the [United States]."[67]

Most importantly for the purposes of this article, and despite several rules covering standards of treatment of detainees or interned individuals, the ICRC Study did not include, as a rule in CIL, the pure authority to detain in armed conflict.[68] Similarly, the U.S. Government's response did not discuss either the inclusion or exclusion of any detention-related rules found in the ICRC Study.[69] Yet the methods used by the ICRC in its study, as well as the contentions found in the U.S. Government response, illuminate any analysis of detention law as CIL. Both the ICRC and U.S. Government's viewpoints assist in assessing the strength of this article's conclusion that the authority to detain in any type of conflict rises to CIL.

III. Common Legal Threads Connecting Detention Law

Although a full history of detention frameworks and regimes in armed conflict is outside of the scope of this article, it is important to take note of some legal threads present in generic detention law for the two main conflict types: international armed conflict (Geneva Convention Common Article 2)[70] and non-international, or internal, armed conflict (Geneva Convention Common Article 3).[71] In both types of conflict, states "have the right to capture and detain enemy combatants, whether or not the combatants are POWs."[72] This section

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[67] *Id.* (citing Hamdan v. Rumsfeld, 548 U.S. 557, 620 n.48 (2006)).

[68] *See* ICRC STUDY VOL. I, *supra* note 3, *passim*; ICRC STUDY VOL. II, *supra* note 51, *passim*.

[69] U.S. Government's Response, *supra* note 58, at 514.

[70] *See, e.g.*, GC III, *supra* note 20, art. 2 (describing international armed conflict as "armed conflict which may arise between two or more of the High Contracting Parties [to the Conventions], even if the state of war is not recognized by one of them . . . [and applying to] all cases of partial or total occupation of the territory of a High Contracting Party . . . ."). Article 21 of GC III authorizes a "[d]etaining power [to] subject prisoners of war to internment." *Id.* art. 21.

[71] *See, e.g.*, *id.* art. 3 (describing internal armed conflict as "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."). Common Article 3 requires parties to such a conflict to, at a minimum, humanely treat "[p]ersons . . . placed hors de combat by sickness, wounds, *detention*, or any other cause . . . ." *Id.* (emphasis added).

[72] Precautionary Measures Response, *supra* note 9, at 1021. The terms international humanitarian law, IHL, and Law of War are used interchangeably throughout this article.

traces common legal threads apparent throughout both (traditional) types of armed conflict to clarify the need for a simple rule of CIL describing the authority to detain in any type of conflict.

A. International Armed Conflict (IAC)

All four Geneva Conventions contain rules governing reasons "for which persons may be deprived of their liberty by a party to an international armed conflict."[73] For example,

> The First Geneva Convention (GC I) regulates the detention or retention of medical and religious personnel[;] the Second Geneva Convention (GC II) regulates the detention or retention of medical and religious personnel of hospital ships[;] the Third Geneva Convention (GC III) is based on the long–standing custom that prisoners of war may be interned for the duration of active hostilities[; and,] . . . [t]he Fourth Geneva Convention (GC IV) specifies that a civilian may only be interned or placed in assigned residence if "the security of the Detaining Power makes it absolutely necessary" (Article 42) or, in occupied territory, for "imperative reasons of security" (Article 78).[74]

Under the rubric of international armed conflict, it is certain that "detention in accordance with GC III and IV does not violate the customary norm against arbitrary deprivation of liberty."[75] Additionally, AP I, a recognized legal instrument of international armed conflict, contemplates detention. For example, Article 75 of AP I states that "[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict."[76]

However, as Part VII.B *infra* demonstrates, international human rights law is quite distinct from these interchangeable terms, and will be treated as such.

[73] ICRC STUDY VOL. I, *supra* note 3, at 344.

[74] *Id.* at 344–45.

[75] Chesney & Goldsmith, *supra* note 2, at 1090 n.55.

[76] AP I, *supra* note 10, art. 75. Interestingly, as the U.S. Department of State Legal Advisor, John Bellinger, III, notes: "[m]any would also argue that Article 75 of Additional Protocol I provides other relevant protections as customary international law

Although these international legal rules governing reasons "for which persons may be deprived of their liberty"[77] exist, they do not apply as a matter of law in every conflict. As stated above, these rules may not apply in the GWOT. For situations in which international armed conflict rules do not apply, U.N. Security Council Resolutions (UNSCRs) often form the legal basis for detaining individuals.[78] Naturally, UNSCRs do not always exist or explicitly cover detention in a given situation. This may result in conflicts not covered by either the law of international armed conflict or internationally-supported mandates such as UNSCRs. Thus, it remains extremely useful to determine whether the actual authority to detain itself constitutes CIL, thereby applying to all types of conflict regardless of how such conflicts are viewed or whether they are covered by UNSCRs.

B. Non-International Armed Conflict (NIAC)

In general, international law is less codified in non-international armed conflicts than in international armed conflicts.[79] For example, Common Article 3 provides the only Geneva Conventions-based guidance in NIACs.[80] Article 3, common to all four Geneva Conventions, prohibits acts such as torture, outrages upon personal dignity, and violence toward individuals detained in non-international (internal) armed conflict.[81] Also, Article 5 of AP II—a recognized legal instrument for non-international armed conflicts—lists provisions to be respected "with regard to persons deprived of their liberty for reasons related to [] armed conflict, whether they are interned or detained."[82] However, these rules only address treatment of detainees once in custody, vice the initial authority to detain. As Bellinger states, "we are

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in *non–international armed conflict*." Bellinger Lecture, *supra* note 1 (emphasis added). Perhaps this is because Article 75 outlines basic protections for when a person is in the power of a party to a conflict; these protections may be so basic that they would apply regardless of the characterization of the conflict.

[77] ICRC STUDY VOL. I, *supra* note 3, at 344.

[78] *See infra* notes 174, 195–98 and accompanying text.

[79] Perhaps states are unwilling to allow international laws to dictate conduct in internal armed conflict, given the infringement on states' sovereignty that would likely accompany such an outside legal intrusion.

[80] *See, e.g.*, GC III, *supra* note 20, art. 3.

[81] *See, e.g.*, *id*.

[82] AP II, *supra* note 11, art. 5. As described throughout this article, the "obligation[s] to protect persons deprived of their liberty" are customary as reflected in various provisions throughout Additional Protocol II. Henckaerts, *supra* note 18, at 12 n.19.

left in a situation where Common Article 3, and depending on a [s]tate's treaty obligations and the nature of the non-state actor, Additional Protocol II, provide the only treaty-based rules governing detention of [individuals]."[83] In many ways, "the application of [international humanitarian law] to non-international armed conflicts, and the conflict with al Qaida in particular, is often an exercise in analogical or in deductive reasoning."[84]

International humanitarian law (IHL) "is uniformly less restrictive in internal armed conflicts than in international armed conflicts."[85] For this reason, in general, "whatever is permitted in international armed conflict is permitted in non-international armed conflict. Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain."[86] Moreover, despite the limited amount of legal guidance on detention in non-international armed conflicts, there are numerous examples of "state practice in the post-1949 era . . . in which international armed conflict-style detention frameworks have been used during [non-international armed conflict]."[87]

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[83] Bellinger Lecture, *supra* note 1.
[84] Goodman, *supra* note 30.
[85] *Id.*
[86] *Id.* (footnotes omitted).
[87] Chesney & Goldsmith, *supra* note 2, at 1086.

> The case studies reported by the Civil War Project established by the American Society of International Law in 1966 provide numerous examples [of international armed conflict-style detention frameworks being used during NIAC]. See Kathryn Boals, The Relevance of International Law to the Internal War in Yemen, in the International Law of Civil War 196 (Richard A. Falk, ed., 1971) (discussing the detention of prisoners by both France and the FLN); Arnold Fraleigh, The Algerian Revolution as a Case Study in International Law, in The International Law of Civil War, supra, at 315 (discussing the detention of prisoners in Yemen); Donald W. McNemar, The Postindependance War in the Congo, in The International Law of Civil War, supra, at 264 (discussing the detention of prisoners in the Congo); see also Allan Rosas, The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable to Armed Conflicts 196 (1976) (observing that during the Nigerian Civil War (1967–1970) the "number of military prisoners seems to have amounted to several thousand").

Id. at 1086 n.29. See Part V.A.1 *infra* for a complete discussion of state practice under the 'authority to detain' rubric.

The most recent, and perhaps strongest, examples of legal support for the authority to detain individuals in the course of NIACs can be seen in two decisions by the U.S. District Court for the District of Columbia. These decisions, in the April 2009 case, *Gherebi v. Obama*,[88] and May 2009 case, *Hamlily v. Obama*,[89] provide that, "[a]t a minimum, . . . States engaged in non-international armed conflict can detain those who are 'part of' enemy armed groups."[90] For example, the *Hamlily* court "concludes that the authority claimed by the government to detain those who were 'part of . . . Taliban or al Qaida forces' is consistent with the law of war."[91] The *Gherebi* court adds that "Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to and fro as they please so long as, for example, shots are not fired, bombs are not exploded, and planes are not hijacked."[92] Although the questions presented in both of these recent federal district court cases involve the limits of the U.S. Government's ability to define membership of enemy organizations, both courts regard as fundamental a state's authority to detain in non-international armed conflict.[93]

IV. Bridging IACs & NIACs—Commander's Authority to Detain

Customary International Law has the ability to exist in various types of conflict, despite the fact that it is more developed in international than in non-international armed conflict. For example, "[p]ractice has [] filled important gaps in the regulation of internal conflicts parallel to those in Additional Protocol I [covering international armed conflicts], but applicable as customary law to non-international armed conflicts." [94] With this in mind, any distinction between the two types of conflict is

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[88] No. 04-1164, 2009 U.S. Dist. LEXIS 34649 (D.D.C. Apr. 22, 2009) (adopting the U.S. Government view that "the President has the authority to detain persons who were part of, or substantially supported, the Taliban or [al Qaida] forces . . . .").

[89] No. 05-0763, 2009 U.S. Dist. LEXIS 43249 (D.D.C. May 19, 2009) (mere support of hostilities not a valid ground for detention).

[90] *Id.* at *26.

[91] *Id.* at *28.

[92] 2009 U.S. Dist. LEXIS 34649, at *112.

[93] *Id.* at *93 ("detention is, as the plurality noted in *Hamdi*, 'a fundamental incident of waging war.'"). Although the *Hamdi* decision recognizes detention as a fundamental incident of waging war *in general*, as described *infra* in Part IV.A, the two recent D.C. District Court decisions are noteworthy in that they specifically regard detention *in NIAC* as fundamental.

[94] Henckaerts, *supra* note 18, at 10.

becoming increasingly irrelevant. As Jakob Kellenberger, President of the ICRC, observes, "State practice goes beyond what those same States have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to *all* armed conflicts, international and non-international."[95] Since the majority of conflict today is of the non-international variety,[96] any near-universal rules must be capable of application in the state versus non-state, civil war, or otherwise internal (i.e. non-international) setting. Most importantly, any legal framework (and its accompanying rules) must recognize the reality of all types of conflict; namely, the commander's need to detain individuals who may pose a threat to his or her forces. It is this notion to which this article now turns.

A. Detention as "Fundamental and Accepted Tool of War"

Regardless of the characterization of a particular conflict, commanders require the tool of detention in order to effectively wage war. The detention of individuals, when employed lawfully, is recognized in both treaty law[97] and in case law. As the United States Supreme Court explained in the 2004 *Hamdi*[98] opinion, the detention of individuals until the cessation of hostilities, without charge or trial, is a "fundamental and accepted [tool of war designed to] prevent captured individuals from returning to the field of battle and taking up arms once again."[99] The Court went on to state, "[w]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our

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[95] Kellenberger, *supra* note 48, at x.

[96] *See infra* Part IV.B (quoting Jean-Marie Henckaerts's assertion that the most endemic form of conflict today is of the internal, or non-international, variety).

[97] *See supra* Part II (discussing Geneva Conventions of 1949 and Additional Protocols of 1977).

[98] Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that "due process demands that that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."). In this case the Supreme Court also upheld "status-based detention until end of hostilities for U.S. citizen Taliban captured in Afghanistan." Chesney & Goldsmith, *supra* note 2, at 1121 n.205.

[99] Chesney & Goldsmith, *supra* note 2, at 1084 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)). Although "Hamdi had little direct impact because its holding was technically limited to U.S. citizens and the United States at the time detained only two U.S. citizens as enemy combatants." *Id.* at 1110. "Capturing and detaining enemy combatants is an inherent part of warfare." *Hamdi*, 542 U.S. at 515 (quoting Hamdi v. Rumsfeld, 316 F. 3d 450, 467 (4th Cir. 2003)).

understanding is based on longstanding law-of-war principles."[100] Courts also recognize the authority of the commander to intern civilians "as a protective measure"[101] and "place under guard all those who endanger the security of his forces."[102] Further examples of case law recognizing the lawful detention of individuals can be seen in the "decisions of national and international tribunals—including the International Criminal Tribunal for the former Yugoslavia and the Inter-American Human Rights Commission."[103]

Specific state practice reflecting detention of civilians as an accepted tool of waging war is best described by Ryan Goodman, Harvard Law Professor of Human Rights and Humanitarian Law. Professor Goodman observes,

> post-1949 U.S. practice in coalition and other military campaigns—including in Korea, Vietnam, Grenada, Panama, Iraq I, Somalia, Haiti, Bosnia and Herzegovina, Kosovo, and Iraq II—has essentially treated civilian detention as an incident of waging war. So has the practice of U.S. allies, enemies, and other states in historical and contemporary conflicts.[104]

Finally, as the International Human Rights Symposium declares:

> There is little question that a state involved in an "armed conflict" . . . is permitted to detain a variety of

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[100] Chesney & Goldsmith, *supra* note 2, at 1122 n.208 (quoting *Hamdi*, 542 U.S. at 519–21).

[101] Goodman, *supra* note 30 (quoting Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc.6 rev. ¶ 52 (1999)).

[102] *Id.* (quoting Leah Tsemel et al. v. Minister of Defense, HCJ 593/82 [1983], *reprinted in* 1 PALESTINE Y.B. INT'L L. 164, 171 (1984)).

[103] *Id.*

[104] *Id.* (citations omitted). Most recently, Article 78 of GC IV provided the basis for the United Nations Security Council Resolution (UNSCR) establishment of internment of civilians in Iraq, beginning in 2004. Panel Discussion, Chatham House International Law Discussion Group, *Treatment of Detainees in Iraq*, Sept. 28, 2006, http://www.chathamhouse.org.uk/files/3361_il280906.pdf. *See* S.C. Res. 1546, U.N. DOC. S/RES/1546 (June 8, 2004). U.N. Security Council Resolution 1546 authorized the Multi–National Forces in Iraq to "take all necessary measures to contribute to the maintenance of security and stability in Iraq[;] . . . [including] internment [when] necessary for imperative reasons of security." S.C. Res. 1546, ¶ 10, U.N. DOC. S/RES/1546 (June 8, 2004) (quoting letter from U.S. Sec'y of State, Colin Powell, annexed to the resolution).

> individuals, including combatants wearing the uniform of a party to the conflict, anyone who takes a "direct part in hostilities" (whether uniformed or not, military or civilian), and broadly, anyone who the detaining power believes is "absolutely necessary" to hold "for imperative reasons of security."[105]

It is instructive that the members of the International Human Rights Symposium admit that states, represented by their commanders on battlefields in armed conflict, require the tool of (lawful) detention as part of their warfighting capability. The simple rule of CIL suggested below[106] observes this authority, already recognized by the international community to be an inherent part of warfighting.

B. States' Desire to Hold Commanders Accountable, Regardless of Conflict Type

Although there may be significantly more CIL apparent in IAC than NIAC, the "divide between the law [in these two areas] . . . [on] the treatment of persons in the power of a party to the conflict [] has largely been bridged."[107] This is because, as the ICRC notes, "[states] have wanted the law to apply to non-international armed conflicts and they have wanted commanders to be responsible and accountable."[108] In this way, the commander's authority to detain, as described above, is constrained by the responsibility to behave lawfully. As ICRC Study author Jean-Marie Henckaerts states,

> the expectations of lawful behavior by parties to non-international armed conflicts have been raised to coincide very often with the standards applicable in international armed conflicts. This development, brought about by States, is to be welcomed as a significant improvement for the legal protection of victims of what is the most endemic form of armed conflict, non-international armed conflicts.[109]

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[105] *International Human Rights Symposium*, *supra* note 38, at 666 (quoting GC III, AP I, and GC IV, respectively).
[106] *See infra* Part V.D.
[107] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 965.
[108] *Id.*
[109] *Id.*

As a result of the ever-decreasing gap between IAC and NIAC, it is possible to describe one simple rule covering both types of conflicts, which can then be tested to determine whether the entire authority to (non-arbitrarily) detain rises to the level of CIL. Ultimately, recognition of the mutual desire of both states and commanders to detain individuals during armed conflict, along with the common threads described above, serve as the foundation on which the authority to detain can actually be viewed as rising to the level of CIL.

V. Testing Whether "Authority to Detain" Rises to the Level of CIL

This Part applies the authority to detain rule to the traditional CIL test. In each subsection, a portion of the test is described, with the corresponding aspect of the proposed rule applied to that portion of the test. More importantly, because an overwhelming number of international legal scholars contributed to the compilation of rules in the ICRC Study, underscoring the wide recognition of its legitimacy,[110] the tenets cited in the ICRC Study can also be applied to form an even more thorough test of the rule envisioned by this article.

A. Requirements for CIL

For a rule to rise to CIL, one must typically look for "unequivocal support for the rule, either in the form of [s]tate practice or of *opinio[] juris*."[111] However, as the ICRC Study recognizes,[112] two additional components of CIL analysis may further assist in ascertaining the degree to which the state practice and *opinio juris* prongs demonstrate unequivocal support for a given rule. The first additional component is the nature of the rule. Specifically, a rule can by nature be "prohibitive, obligatory or permissive."[113] This Part argues that the "authority to detain" rule is, by nature, permissive.[114] Permissive rules are easier to quantify and more capable of satisfying the "state practice" prong than prohibitive or obligatory rules. The second additional concept is the notion of "specially affected" states. With this notion, certain states'

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[110] *See supra* Part II.C.
[111] U.S. Government's Response, *supra* note 58, at 522.
[112] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 960–63.
[113] *Id.* at 960.
[114] *See infra* Part V.B.

practices can be weighted more heavily, adding to the overall "density"[115] of the practice and increasing the likelihood of satisfying the state practice prong of CIL analysis. This section describes the two traditional aspects of CIL—state practice and *opinio juris*—to ensure proper application of the two additional, ICRC-recognized aspects of CIL[116] in the subsequent section.

1. State Practice

States' consistent use of certain practices may satisfy the "state practice" prong of CIL analysis. It is important to note that "custom-generating practice has always consisted of actual acts of physical behavior and not of mere words, which are, at most, only promises of a certain conduct."[117] In addition, state practice has to be "sufficiently 'dense' to create a rule of [CIL], which means that it has to be virtually uniform, extensive, and representative."[118] As a definition, "to be virtually uniform means different states must not have engaged in substantially different conduct."[119] In practical terms, because even "training manuals, instructor handbooks and pocket cards for soldiers [can be considered to reflect] State practice,"[120] actions consistent with these materials are more important than the mere existence of the words on paper. Applying this article's rule to the test, as described above,[121] it can be seen that states routinely demonstrate a willingness to detain. This detention occurs even when individuals do not fall neatly into the definition of either a combatant or a civilian, and often without a UNSCR authorizing such detention.[122] States do not generally engage in substantially different conduct in the detention arena, which itself is characterized by physical behavior, and not mere words.[123]

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[115] *See infra* Part V.C.
[116] "Nature of the rule" and "specially affected states." *See infra* Parts V.B and V.C.
[117] U.S. Government Response, *supra* note 58, at 530 n.77 (quoting K. Wolfe, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT'L L. 1 (1993)).
[118] Henckaerts, *supra* note 18, at 9.
[119] *Id.*
[120] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 964.
[121] *See supra* Part III.
[122] *See id.*
[123] *See supra* note 117 and accompanying text.

2. Opinio Juris

The second element of traditional CIL analysis is *opinio juris*, which "refers to the legal conviction that a particular practice is carried out 'as of right.'"[124] Interestingly, according to the ICRC, it may not be "necessary to demonstrate . . . the existence of an *opinio[] juris*"[125] when a sufficiently *dense* state practice exists. Specifically, the ICRC suggests that the same action can satisfy both the *opinio juris* and state practice prongs.[126] As applied to the rule suggested by this article, it is therefore possible to satisfy the "*opinio juris*" element of CIL rule-making by referring to the density of state practice in the area. Thus, simply by viewing the history and sufficiency of states engaging in detention of individuals in armed conflict, it is possible to satisfy the requirement that the practice be carried out as a legal obligation.

B. "Permissive Rules" in CIL

As described above, the ICRC identifies three types of rules in CIL—prohibitive, obligatory, and permissive. Prohibitive rules are those "supported not only by statements recalling the prohibition in question but also by abstention from the prohibited act."[127] For example, the CIL rule prohibiting the use of blinding laser weapons is supported by states abstaining from using such weapons.[128] Obligatory rules, naturally, "establish the existence of an obligation, for example, the rule that the wounded and sick must be cared for . . . ."[129] Finally, "[p]ermissive rules . . . are supported by acts that recognize the right to behave in a given way but that do not, however, require such behavior[.] This will typically take the form of States taking action in accordance with those rules, together with the absence of protests by other States."[130]

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[124] Henckaerts, *supra* note 18, at 9.
[125] *Id.* "It is usually not necessary to demonstrate separately the existence of an *opinio[] juris* because it is generally contained within a particularly dense practice." *Id.*
[126] The U.S. Government's Response disagrees with this notion, arguing that the two prongs should be assessed separately. *See* U.S. Government's Response, *supra* note 58, at 515.
[127] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 960.
[128] *Id.*
[129] ICRC STUDY VOL. I, *supra* note 3, at xl.
[130] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 960.

In the context of "authority to detain," we can apply the permissive rule concept, because detaining individuals logically is allowed, but not required. It is neither obligatory nor prohibitive for states to detain individuals. Clearly a state does not have an obligation to detain. Yet, it also cannot be prohibited from lawful detention; therefore, the rule cannot be prohibitive in nature. For example,

> it would be absurd to accept an interpretation of IHL that results in a state possessing the legal authority to purposefully kill Actor X but lacking the legal authority to detain Actor X. States would otherwise have a perverse incentive to kill individuals who pose a military threat if the alternative was to let them go free.[131]

For this reason, the rule described herein does not appear to be either obligatory or prohibitive in nature. Rather, states have the right to act in a given way (i.e., detain), but are not required to engage in that behavior (i.e., a state is not required to detain anyone). This suggests that, of the three possibilities, an authority to detain rule best fits a permissive construct. Appropriately constructed as a permissive rule, the "authority to detain" concept proposed by this article becomes increasingly recognizable as a rule of CIL.[132]

C. Specially Affected States

Next, it must be noted that the state practice prong will be weighted toward specially affected states in a given area. As ICRC Study author Henckaerts states, "[n]o precise number or percentage [of states practicing the rule] is required [for a rule to become CIL] because it is not simply a question of how many states participated in the practice, but also *which* states participate."[133] As a brief example, the ICRC Study declares a rule of CIL to prohibit "means and methods of warfare expected to cause widespread and severe damage to the environment[,] . . . notwithstanding objections in whole or in part by the United States, the United Kingdom, and France, which the [s]tudy considers 'specially–

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[131] Goodman, *supra* note 30 (footnote omitted).

[132] This article's proposed rule highlights a key point argued by Professor Ryan Goodman. Namely, if states have a right to kill an individual on the battlefield, they must implicitly have the right to a less coercive measure, such as the right to detain the same individual. *See id.*

[133] Henckaerts, *supra* note 18, at 9.

affected' with respect to possession of nuclear weapons."[134] This is because the practice of nations with the capacity to inflict such devastation on a significant portion of the environment—that is, nations with nuclear capability—must be weighed more heavily than the practice of those without such a capability.

In the U.S. Government's Response to the ICRC Study, however, the United States argues that the ICRC did not follow its own doctrine on the issue of specially affected states.[135] Although the U.S. diplomats allow that "[t]he study recognizes that the practice of specially affected States should weigh more heavily when assessing the density of State practice . . . [,]"[136] according to Bellinger and Haynes, in actuality,

> the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.[137]

The U.S. Government's Response also argues that states are not simply "specially affected" only when the ICRC finds their practice to be relevant. Rather,

> specially affected States generate practice that *must* be examined in order to reach an informed conclusion regarding the status of a potential rule. As one member of the [ICRC] Study's Steering Committee has written, "The practice of 'specially affected states'—such as nuclear powers, other major military powers, and occupying and occupied states—which have a track record of statements, practice and policy, remains particularly telling."[138]

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[134] Balgamwalla, *supra* note 43, at 14.
[135] U.S. Government's Response, *supra* note 58, at 521.
[136] *Id.* (citing ICRC STUDY VOL. I, *supra* note 3, at xxxviii).
[137] *Id.* at 515.
[138] *Id.* at 517 n.3 (quoting Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 249 (1996)).

The ICRC adds: "it is clear that there are States that have contributed more practice than others because they have been 'specially affected' by armed conflict. Whether, as a result of this, their practice *counts more* than the practice of other States is a separate question."[139]

Regardless of whether the ICRC Study actually adhered to its authors' stated belief on the issue, all sides agree that the practices of specially affected states are extremely important in assessing the likelihood of a rule becoming CIL. In general terms, certain states are more experienced with armed conflict than others. For instance, "[b]ecause of its experience with armed conflict, the United States, in particular, has contributed a significant amount of practice to the formation of customary humanitarian law."[140] In the context of "authority to detain," this reality places certain states ahead of others in weighing their practices. For example, because the United States is clearly an experienced nation in terms of detention operations, its practices should carry more weight than those states which have little or no practice in the area. The U.S. Government's practice demonstrates a clear willingness to detain individuals during any type of armed conflict,[141] thereby bolstering the CIL claim that states have a right to detain.

D. Simplicity Requirement for Proposed Rule

A rule of CIL must be unequivocally supported.[142] Because of the need for near-universal agreement, and in order to avoid debate over terms and their meanings, such a rule must be simple. As ICRC Study author Jean-Marie Henckaerts notes, "[a]ny description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties."[143] A simply-stated rule also increases the likelihood of its application in both international and non–international armed conflict.[144] Conversely, an overbroad rule will be of little use. For these reasons, the simply-stated rule that *CIL authorizes*

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[139] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 963.
[140] *Id.*
[141] *See supra* Part III.
[142] *See supra* Part V.A.
[143] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 964.
[144] *See, e.g.*, *id.*, discussing access for humanitarian relief missions: "The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts." *Id.*

the detention of individuals during armed conflict is highly effective in that it is understood easily, is not overbroad, and is applicable regardless of the characterization of the conflict.

VI. Unwritten CIL: The "Authority to Detain" Concept as a Logical Prerequisite to Established Principles of CIL[145]

As a further test of this article's proposed rule, it is helpful to analogize the rule to other established tenets of CIL. Expectedly, several aspects of detention law are already recognized as CIL.[146] Three of the most significant, clearly-established rules in this area include the requirement for humane treatment, the general prohibition against arbitrary detention, and the principle of non-refoulement.[147] Yet, the initial authority to detain—that is, the authority required as a predicate to the three significant rules—has previously not been recognized as CIL.[148] As this Part illustrates, however, the authority for non-arbitrary detention must logically exist in order for a state to accede to the three above-cited rules. This logical inference, along with the evidence provided throughout this article, underscores the assertion that the authority to detain actually constitutes CIL.

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[145] This is analogous to the well-known torts doctrine of Res Ipsa Loquitur, the Latin phrase meaning "the thing speaks for itself." BLACK'S LAW DICTIONARY 1311–12 (7th ed. 1999). The well-known torts doctrine can be applied here; specifically, if these recognized aspects of CIL—all three of which require an individual to be in detention before they can apply—exist, then logically the initial authority to (lawfully) detain can be presumed to exist as CIL.

[146] *See* ICRC STUDY VOL. I, *supra* note 3, at 428–51.

[147] *See infra* Part VII. In terms of the latter concept,

> *Non-refoulement* is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution. The principle [is] codified in Article 33 of the 1951 Refugee Convention [and] . . . is part of international human rights law and international customary law. . . .

Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT'L J. OF REFUGEE L. 373 (2008), http://ijrl.oxfordjournals.org/cgi/content/abstract/20/3/373. The author argues that, although accepted as CIL, "the evidence that *non-refoulement* has acquired the status of a *jus cogens* norm is less than convincing." *Id*. *See* Geneva Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 2545.

[148] *See supra* Part I.

A. Humane Treatment

The principle of humane treatment is recognized as CIL in the recent ICRC Study.[149] For example, Rule 118 of CIL, according to the ICRC, states that "[p]ersons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention."[150] Apart from the ICRC Study, Article 5 of AP II states that "[p]ersons . . . whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely . . . ."[151] Additionally,

> [i]n its General Comment on Article 4 of the International Covenant on Civil and Political Rights [ICCPR], the UN Human Rights Committee declared Article 10, which requires that persons deprived of their liberty be treated with humanity and respect for the inherent dignity of the human person, to be non-derogable and therefore applicable at all times.[152]

Most importantly, "the great majority of the provisions of the Geneva Conventions of 1949, including [C]ommon Article 3, are considered to be customary law."[153] In particular, humane treatment principles are embodied throughout GC III and GC IV.[154] Related concepts, including but not limited to ICRC visits,[155] the safeguarding of detainees in a combat zone,[156] the segregation of both women and men[157] and children and adults,[158] and the requirement to respect religious practices,[159] can also be viewed under the rubric of humane treatment, according to the ICRC Study.[160] Finally, similar humane treatment concepts are found in countless other international legal instruments,

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[149] ICRC STUDY VOL. I, *supra* note 3, at 428–51.
[150] *Id.* at 428.
[151] AP II, *supra* note 11, art. 5.
[152] ICRC STUDY VOL. I, *supra* note 3, at 307.
[153] *Id.* at xxx. As the editors further state, "the same is true for the 1907 Hague Regulations. . . ." *Id*.
[154] *See, e.g.*, *id.* at 428–51.
[155] ICRC STUDY VOL. I, *supra* note 3, at 442.
[156] *Id.* at 435.
[157] *Id.* at 431.
[158] *Id.* at 433.
[159] *Id.* at 449.
[160] *Id.* at 428–51.

including the 1863 *Lieber Code*,[161] 1874 Brussels Declaration,[162] 1880 *Oxford Manual*,[163] 1948 American Declaration on the Rights and Duties of Man,[164] the 1987 European Prison Rules,[165] military manuals of different nations,[166] and various instruments of national legislation and case law,[167] to name a few widely, recognized sources of CIL.

B. Prohibition Against Arbitrary Detention

As with humane treatment, multiple ICRC-recognized rules of CIL can be found under the general prohibition against arbitrary detention.[168] Most obviously, Rule 99 states that "[a]rbitrary deprivation of liberty is prohibited. . . . State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[169] As the ICRC states, "both international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention."[170] Further, "[t]he [International Covenant on Civil and Political Rights (ICCPR)] makes clear that detainees are entitled to, among other things, protection against 'arbitrary arrest or detention.'"[171] Additionally, "the ICRC's study of the customary law of war . . . does

[161] ICRC STUDY VOL. II, *supra* note 51, at 2009 (providing, in Article 76, that "prisoners of war shall . . . be treated with humanity").
[162] *Id.* (providing, in Article 23(2), that "POWs must be treated humanely").
[163] *Id.* (providing, in Article 63, that "POWs must be treated humanely").
[164] *Id.* (declaring, in Article XXV, that "every individual who has been deprived of his liberty has the right to . . . humane treatment during the time he is in custody").
[165] *Id.* (stating, in Rule 1, that "the deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity and are in conformity with these rules").
[166] *Id.* at 2010–15 (discussing "national practice" in the humane treatment aspect of customary international law).
[167] *Id.* at 2015–16 (listing various states with penal code sections punishing inhumane acts against prisoners of war).
[168] Although arbitrary detention is prohibited, clearly non-arbitrary detention is not. *See supra* note 9 and accompanying text.
[169] ICRC STUDY VOL. I, *supra* note 3, at 344. For a thorough listing of state practice in this area, see ICRC STUDY VOL. II, *supra* note 51, at 2328–62.
[170] ICRC STUDY VOL. I, *supra* note 3, at 344.
[171] *International Human Rights Symposium*, *supra* note 38, at 671–72.

note that detention in accordance with GC III and IV does not violate the customary norm against arbitrary deprivation of liberty."[172]

Specifically in terms of non-international armed conflicts, "[t]he prohibition of arbitrary deprivation of liberty . . . is established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law."[173] Relatedly, in the ICRC's exhaustive search of state practices in this area, "[n]o official contrary practice was found with respect to either international or non-international armed conflicts. Alleged cases of unlawful deprivation of liberty have been condemned. The U.N. Security Council, for example, has condemned 'arbitrary detention' in the conflicts in Bosnia and Herzegovina and Burundi."[174] It is apparent that, should a state choose to exercise its detention authority, it must simultaneously ensure that it does not become arbitrary in nature. Administrative reviews, trials, and other due process-type mechanisms may assist in the prevention of an arbitrary detention regime (although a full discussion of these topics is outside the scope of this article).[175]

C. Non-refoulement

Yet another example of established CIL can be seen in the concept of non-refoulement.[176] This concept is best articulated in the Convention Against Torture (CAT) and Article 45 of GC IV.

> Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides that no state shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he or she

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[172] Chesney & Goldsmith, *supra* note 2, at 1090 n.55 (citing ICRC STUDY VOL. I, *supra* note 3, at 344).
[173] ICRC STUDY VOL. I, *supra* note 3, at 347.
[174] *Id.* (citing UNSCRs 1019, 1034, and 1072).
[175] *See supra* note 8.
[176] The ICRC does not include the concept of non-refoulement in its study. For a detailed discussion of this omission, see Jamieson L. Greer, Comment, *A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity*, 3 HUM. RTS. L. COMMENTARY (2007), *available at* http://www.nottingham.ac.uk/shared/shared_hrlcpub/Greer.pdf (discussing ICRC's "omission of a customary rule relating to states' *non-refoulement* obligation in wartime").

> would be in danger of being subjected to torture. To make such determinations, the CAT requires states to examine all relevant factors, including a consistent pattern of gross or flagrant violations of human rights in the country in question.[177]

Similarly, this notion is captured in Article 45 of GC IV: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[178]

States consistently adhere to the principle of non-refoulement despite the serious logistical issues associated with such adherence during times of conflict. For example, the prohibition against returning individuals to countries where the sending state believes they may be tortured presents significant challenges in the GWOT context.[179] As John Bellinger, Legal Advisor to the U.S. Secretary of State, explained in a recent lecture at Oxford, "[t]his problem grows in magnitude when the detainees we wish to repatriate express fears of mistreatment or persecution upon return."[180] Bellinger further states:

> In the current conflict with al Qaida, the United States has . . . establish[ed] the firm policy not to turn over detainees where it is more likely than not they will be tortured. This policy, central as it is to Western values, has meant that dozens of detainees who cannot be repatriated, such as the Uighurs to China, have remained at Guantanamo for years after we have wished to transfer them.[181]

The strict adherence to non-refoulement, along with the principles of humane treatment and prohibition against arbitrary detention, is

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[177] Human Rights Watch, Briefing to the 60th Session of the U.N. Comm'n on Human Rights (Jan. 28, 2004), *available at* http://www.hrw.org/en/news/2004/01/28/torture-and-non-refoulement. In its briefing, Human Rights Watch "questions the legal sufficiency of diplomatic assurances [that receiving countries will not torture suspects after they are transferred], particularly in cases where the receiving government engages in widespread or systematic torture." *Id*.

[178] GC IV, *supra* note 22, art. 45.

[179] Bellinger Lecture, *supra* note 1.

[180] *Id.*

[181] *Id.*

consistently practiced by states in spite of the clear logistical challenges related to each requirement. As a result of states' consistent adherence to these principles, this article's rule gains further credence as a reflection of CIL.

D. "The Thing Speaks For Itself"[182]

In spite of its searching inquiry in 2005, the ICRC acknowledges "that the formation of customary international law is an ongoing process."[183] As suggested throughout this article, "it cannot be concluded that any particular treaty rule is *not* customary merely because it does not appear as such in this study."[184] This characterization of the inexact nature of CIL, especially by the ICRC and all of the attendant international law experts providing input to the ICRC Study, supports the existence of the initial authority to detain. Nevertheless, in spite of the ICRC's admission, more than an application of the logical paradigm described in this Part is required for a rule to become CIL.[185]

It is important to note that policy considerations reflected in existing detention regimes[186] must be separated from a pure analysis of legal framework to determine whether the authority to detain constitutes CIL. The above discussion does not consider the impact of policy. Instead,

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[182] BLACK'S LAW DICTIONARY 1311–12 (7th ed. 1999) (definition of *res ipsa loquitur*).
[183] Kellenberger, *supra* note 48, at xi; *see also* Greer, *supra* note 176 ("[C]ustomary law is inherently vague because it is not the product of deliberate processes but rather is the sum of many parts.").
[184] ICRC STUDY VOL. I, *supra* note 3, at xxx.
[185] In particular, the analysis under the paradigm described here necessarily requires a consistent reference point. One must apply all three established principles discussed in this Part—humane treatment, the prohibition against arbitrary detention, and non-refoulement—to the same type of individual before asserting the logical 'authority to detain' predicate. This 'individual' will be either a combatant (GC III), a civilian (GC IV), or the transnational terrorist contemplated elsewhere in this article. In order for this paradigm to be accurate—for example, to conclude that the authority to detain transnational terrorists constitutes CIL—the requirement to humanely treat, not arbitrarily detain, and not "refoul" even transnational terrorists must also rise to the level of CIL. Thankfully, it does. *See* discussion *infra* Part VI. In this way, the logic of this section is sound and significantly bolsters the overall argument of this article; namely, that the authority to detain exists in CIL. In other words, the three principles of CIL described in this Part do not necessarily have to be CIL for the overall argument of this article to succeed. For example, these three principles could be based solely on treaty law without derailing the overall argument that the authority to detain is CIL. Nevertheless, it helps our understanding for these aspects of law to be firmly entrenched as CIL.
[186] *See supra* note 8.

when viewed through a paradigm for authority to detain as CIL, established international law concepts such as the inherent authority of commanders "to incapacitate [individuals] in order to prevent future harm in battle . . . ."[187] can ultimately be reflected in a simple, workable rule of CIL. When viewed through the lens of established concepts such as the preventive nature of detention[188] and the inherent authority of the commander, the paradigm described here becomes most useful.

VII. Counterarguments

As with any proposed rule, there will not be instant, unchallenged acceptance of this article's thesis. For example, the protections outlined in Part VI *supra*, (humane treatment, prohibition against arbitrary detention, and the principle of non-refoulement), may not necessarily indicate universal acceptance for the authority to detain. One could argue that these protections exist because the international community knows that states will engage in *unlawful* detentions. Of course, this article is premised on the notion of only lawful authority to detain rising to the level of CIL.[189] Thus, if a state is willing to engage in unlawful detention, then rules describing lawful acts—regardless of whether the rules involve authority to detain or standards of treatment during detention—are unlikely to deter it. Furthermore, as Henckaerts states, "[w]hen there is overwhelming evidence of state practice in support of a rule, alongside repeated evidence of violations of that rule, such violations do not challenge the existence of the rule in question."[190]

Jack Goldsmith and Bobby Chesney, both of whom are recognized detention law scholars, articulate another counterargument to the proposed rule: "it would be difficult to show that any particular set of procedures used in actual [detention law] practice reflects [*opinio juris*] rather than practical or political expediency."[191] The ICRC appears to

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[187] Chesney & Goldsmith, *supra* note 2, at 1082 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)). Although, as the authors make clear, this incapacitation "in no way implies condemnation of those detained." *Id*.

[188] *Id.* at 1093 ("[t]he detention framework under the laws of war has always been oriented toward prevention.").

[189] *See supra* note 8.

[190] Henckaerts, *supra* note 18, at 9.

[191] Chesney & Goldsmith, *supra* note 2, at 1092. Discussing various models offering procedural safeguards in the detention arena, the authors state "[t]he variability of these frameworks . . . belies any claim that a specific set of procedural safeguards is mandated by the customary laws of war." *Id.*

agree with this assessment, arguing that the international community can never be certain of the motivations of a state in taking certain actions.[192] However, as described in Part V.A.2, according to the ICRC the same state action may satisfy both the "state practice" and "*opinio juris*" prongs of the CIL analysis. Thus, it might not be necessary to observe separate proof, apart from its practice, of a state's belief that it has a legal obligation to act a certain way. For this reason, a state's motivations, whether based on political expediency or other factors, may hold little weight in the overall analysis of whether this article's proposed rule rises to CIL.

Another argument against the rule proposed in this article is perhaps the most obvious: If the authority to detain during armed conflict is CIL, the ICRC would have included it in its study. But, the ICRC acknowledges that rules not included in its study may nevertheless constitute CIL. As described in Part II.C, Henckaerts acknowledges that the ICRC Study is merely the beginning of the "dialogue"[193] necessary to further the development of CIL. By recognizing that other rules may constitute CIL, the ICRC tacitly acknowledges the possibility that the authority to detain may rise to CIL.

Notwithstanding the above challenges to this article's thesis, two significant aspects of international law provide the most compelling counterarguments to the rule envisioned by this article. The first of these disputes considers a state's authority to detain as inherent within its power of self-defense, rather than as a permissive rule of CIL. The second disagreement focuses on whether an application of human rights law is more appropriate than a pure international humanitarian law view of a state's authority to detain.

A. Detention as Inherent in States' Power of Self-Defense

A counterargument to this article's proposed rule characterizes a state's power to detain as inherent in its authority of self-defense. For example, the U.S. Government has expressed a view that detention is

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[192] *See, e.g.*, Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 963 ("[I]t can never be proven that a [s]tate votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both).").

[193] *See supra* Part II.C.

inherent within the power of self-defense. As President George W. Bush stated in his November 2001 Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained . . . ."[194] Also, the NATO-led International Security Assistance Force (ISAF) mission, which includes the United States, derives authority from UNSCR 1386[195] and, most recently, UNSCR 1833,[196] as a basis for operating in Afghanistan. These UNSCRs authorize member states "participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate."[197] Although not explicitly authorizing detention, this statement—worded exactly the same in both UNSCRs—can be viewed as authorizing the detention of individuals constituting a threat to the security of ISAF forces.[198]

While it is clear that self-defense can form the basis for the authority to detain individuals in conflict, this does not preclude CIL from

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[194] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, §§ 2(a)(1) & (2) (Nov. 16, 2001). This statement defines

> (a) The term "individual subject to this order [to] mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.

Id.

[195] S.C. Res. 1386, U.N. DOC. S/RES/1386 (Dec. 20, 2001).

[196] S.C. Res. 1833, U.N. DOC. S/RES/1833 (Sept. 22, 2008).

[197] S.C. Res. 1386, *supra* note 195, ¶ 13(3); S.C. Res. 1833, *supra* note 196, ¶ 24(2).

[198] S.C. Res. 1386, *supra* note 195, ¶ 11.

providing similar authority. Customary international law is most useful in assisting in the interpretation of other legal instruments. As ICRC President Jakob Kellenberger states, "[CIL] can help in the interpretation of . . . law."[199] Thus, CIL can assist in interpreting actions undertaken by states in self-defense. This article's rule can therefore be seen as amplifying the discussion of authority in a given area. The rule, as with other tenets of CIL, need not exist in place of certain authority such as the self-defense bases described above. Rather, a rule of CIL such as the one contemplated by this article can be relied upon to not only fill legal gaps (described elsewhere in this article) but also to assist in interpreting the self-defense authority, such as the U.S. Government's GWOT view and the United Nations' ISAF mandate, described above.

B. Application of Human Rights Law

Support also exists to suggest that human rights (HR) law comprises the most relevant body of law in the detention arena.[200] At a minimum, as Professor Goodman points out, "state actions during wartime constitute relevant practice for customary international law of both IHL and human rights law."[201] Additionally, "[b]oth U.S. and international courts have agreed that international human rights law . . . appl[ies] in situations of armed conflict."[202] Issues involving the length of detention can also be viewed under the heading of HR law, despite the GC III declaration that POWs be "released and repatriated without delay after the cessation of active hostilities."[203]

However, HR Law does not take precedence over international humanitarian law. As the U.S. Government states, "[i]t is humanitarian

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[199] ICRC STUDY VOL. I, *supra* note 3, at x.

[200] "Some have [even] argued that the laws of war are silent on the question of military detention during [non-international armed conflict], permitting states to employ military detention in that context insofar as domestic legal authorities so provide (subject to international human rights law norms governing detention)." Chesney & Goldsmith, *supra* note 2, at 1085 n.25.

[201] Goodman, *supra* note 30.

[202] *International Human Rights Symposium*, *supra* note 38, at 671 n.26.

[203] GC III, *supra* note 20, art. 118. An interesting viewpoint, outside of the scope of this article, might suggest that commanders themselves merely want individuals removed from the battlefield for a temporary period of time—perhaps as short as twenty-four hours—in order for them to accomplish the mission in their particular battlespace. In other words, commanders might not argue for long-term detention but do not necessarily have the choice once an individual is detained.

law, and not human rights law, that governs the capture and detention of [individuals] in armed conflict."[204] Likewise, "the U.S. State Department has taken the position that IHL, and not international human rights law, governs its current operations against 'al Qaida, the Taliban, and their supporters.'"[205] This is because the generic HR law is superseded by the particularized body of international humanitarian law applicable in armed conflict. As the U.S. Government states, "human rights law, to the extent it is applicable during armed conflict, must be interpreted in the light of relevant *lex specialis* as set forth in the body of humanitarian law."[206]

Human Rights law establishes certain minimum standards below which states must not fall in the detention arena. For example, "a party to a conflict that is unable or unwilling to respect the strictures of Common Article 3 with regard to conditions of confinement has no authority to detain."[207] Further, clearly "IHL requires a specific determination that each civilian who is detained poses a threat to the security of the state."[208] Otherwise, such detention would be arbitrary.[209] However, it is clear that "even international human rights law—which one might expect to apply a heightened level of rights protection—does not foreclose the preventive detention of civilians under certain circumstances."[210] In addressing the concerns over duration of detention, the U.S. Government's view is that "the detainees are being held in an armed conflict that is ongoing."[211] Because of this, "the *lex specialis* would be international humanitarian law because the detainees were captured in the context of an ongoing armed conflict."[212] While HR law can and must be observed to the extent that it establishes minimum standards for the detention of individuals, it does not trump the IHL authority described, and supplemented by the rule of CIL, throughout this article.

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[204] Precautionary Measures Response, *supra* note 9, at 1021.
[205] *International Human Rights Symposium*, *supra* note 38, at 671 n.26 (quoting United States Responses to Selected Recommendations of the Human Rights Committee (Oct. 10, 2007), http://www.state.gov/documents/organization/100845.pdf).
[206] Precautionary Measures Response, *supra* note 9, at 1021.
[207] Goodman, *supra* note 30.
[208] *Id.* (citing ICRC Commentary to Article 42 of GC IV, *supra* note 22).
[209] *See supra* Part VI.B.
[210] Goodman, *supra* note 30.
[211] Precautionary Measures Response, *supra* note 9, at 1021.
[212] *Id.* at 1022.

VIII. Conclusion

Although the concepts of "detention authority" and "treatment during detention" seem inextricably linked,[213] they are not traditionally viewed as such in the field of CIL. The former is not typically included in the field of CIL, while the latter, encompassing concepts such as humane treatment, the prohibition against arbitrary detention, and non-refoulement, is well-known to constitute CIL. Yet, there are instances in which individuals must be detained absent authority under GC III, GC IV, or UNSCR language. Self-defense may provide the authority in a given regime, as in the ISAF example, but CIL is both broader and more helpful in providing the overall legal authority to detain. Above all, CIL assists in interpreting actions undertaken by states, regardless of whether such actions are based in treaty law, self-defense, or any other type of basis on which the state relies.

When the "permissive rule" and "specially affected states" concepts[214] are applied in addition to the required prongs of "state practice" and "*opinio juris*," the authority to detain can be seen as rising to the level of CIL. This is particularly true when the authority to detain is further viewed as a logical predicate ("unwritten rule")[215] to the other written rules regarding treatment of detainees. As states retain the fundamental and accepted[216] tool of detention regardless of the type of conflict in which they find themselves, the gap in detention law between international and non-international armed conflict begins to close. Finally, after applying the same principles used by the ICRC in its groundbreaking study[217] to the "authority to detain" paradigm, a simple, yet workable, rule emerges. As with all aspects of CIL, this rule—that the authority to detain, regardless of the type of conflict in which the detention occurs, is CIL—actually closes the remaining gap in detention law coverage.

The closing of the gap between the Third and Fourth Geneva Conventions[218] is particularly important with the GWOT and future conflicts seemingly shifting away from the classic international armed conflict model. Not only are rules of CIL "binding on all states

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[213] *See* discussion *supra* Part VI.
[214] *See supra* Part V.
[215] *See supra* Part VI.
[216] *See supra* Part IV.A.
[217] *See supra* Part II.C.
[218] *See supra* Part II.A.

regardless of the ratification status of treaties,"[219] but also "in the case of those rules applicable to all parties in non-international armed conflicts, [the same rules are binding] *on armed opposition groups* as well."[220] This application of CIL to stateless individuals, such as transnational terrorists, is critical. Because "[c]hallenging work will follow, not only for U.S. Government lawyers, but for all who are tasked to articulate what the current law of war is and how to apply it[,]"[221] the simple rule envisioned by this article seeks to advance in a meaningful way the "ongoing dialogue"[222] critical to further the development of CIL.

Ultimately, a rule describing the initial authority to detain further develops CIL and, more importantly, assists in the efforts to resolve the "central legal challenge" of present-day armed conflict—namely, the "legitimate incapacitation of uniformless terrorists" not contemplated by the Geneva Conventions.[223]

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[219] Henckaerts, *supra* note 18, at 11.

[220] *Id.* (emphasis added); *see also* Balgamwalla, *supra* note 43, at 16 (citing remarks of Professor Jordan Paust, Law Foundation Professor at the University of Houston Law Center, Sept. 28, 2005) ("[b]ecause [CIL] applies to individuals, non-states, and belligerent entities . . . [in other words,] its provisions also apply to stateless insurgents and binds them . . . .").

[221] Mandsager, *Introductory Note of U.S. Government's Response*, *supra* note 46, at 512.

[222] Henckaerts's Response to U.S. Government's Response, *supra* note 49, at 966.

[223] Chesney & Goldsmith, *supra* note 2, at 1081.